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CURRENT TOPICS.

We publish this week the first number of our "Monthly Index," which hereafter will be a regular feature of the JOURNAL. It is hoped that our subscribers will find it an appreciable convenience for searching the current pages of the JOURNAL, before the issue of the semi-annual index at the end of the volume. We have for some time realized the desirability of some means of enabling the busy lawyer to find the case or article which happens to be the object of his search without the necessity of going over the JOURNAL, number by number, or else of waiting until the conclusion of the volume, and it is hoped that this monthly index will accomplish that result. With the present multiplication of precedents and books, the search for authority is growing annually more and more tedious and laborious, and consequently any contrivance which tends to lessen the labor and tedium of the more mechanical part of that search, can not be unappreciated.

At any rate, this Monthly Index costs the reader of the JOURNAL nothing, and inasmuch as we print it upon the pages of the cover it in no wise obtrudes upon the space in the JOURNAL, and it is hoped that it will be of practical utility as a labor-saving device to the busy lawyer whose time is valuable.

One matter to which we desire to call the reader's attention is the fact that though this number of the Index, which embraces the four issues of the JOURNAL during August, is printed with the first issue of the paper in September, such will not hereafter be the rule. The Index of each month will be published in the last issue of the month, which will be included in it.

Connecticut has added her quota to the learning of the year, on the question of what properly constitutes the "income" of capital stock in a corporation, in the recent decision of *Brinley v. Grou*. In that case stock in a corporation was left by a testator to trustees to pay over the

"income" annually to his children. The company increased its capital, and, as its stock was at a premium, apportioned the right to subscribe the new stock among its old shareholders. The trustees sold a portion of the right to subscribe to the new stock, which they thus acquired, and, with the proceeds of such sale, they subscribed for the balance, and added the new shares to the stock in their hands. The *cestuis que trust* claimed these new shares as a part of the "income" of the stock. Said the court: "In the case before us, neither in fact nor form did the corporation make any division, or part with any portion of its earnings in behalf of the stockholders. On the contrary, it manifestly desired to retain its surplus intact, and increase its strength by the addition of a million dollars to its capital; its accumulated earnings all remained its property, and subject to the risks of its business. It offered to the shareholders the privilege of paying in this sum; investors were of opinion that this privilege was worth a premium; not because it carried with it the right then or ever to demand any portion of the surplus retained in good faith by the company, but presumably because they believed that from the income from its capital, surplus and business it would make regular dividends largely in excess of the ordinary rate of interest. * * * In short, all of the increase of value which is realized from the act of the trustees in selling either the existing share with the privilege annexed or the privilege severed therefrom, belongs to the capital; purchasers pay it from their money; all that is realized from the act of the corporation in making dividends belongs to the life tenant (*Atkins v. Albree*, 12 Allen, 359; *Moss's Appeal*, 2 Norris, 264), and this regardless of the question whether profits were accumulated before or after the purchase of shares by the trustees; if before, and a dividend is made immediately after, it is the good fortune and the property of the life tenant; if after, and the corporation does not divide them during the life tenancy, it is the advantage of the remainder-man; each must take the risk of his time, both as to the success of the business and the action of the directors in the matter of dividends." See, also, *Miller v. Guerrard*, 14 Cent. L. J. 214; *Biddle's Appeal*, 14 Cent. L. J. 253; *Vinton's Appeal*, 14 Cent. L. J. 273.

THE LAW OF ESCROWS.

1. General and Historical.—The general principles of the law of escrows are quaintly laid down in Sheppard's Touchstone, and prior to this authority we find the same doctrines stated as settled law in the treatise of Perkins, which my Lord Coke tells us was "wittily and learnedly composed and published" in the reign of Edward VI. There are also numerous references to the same in the Year Book.¹ Although the law was thus early regarded as settled in its general features, yet, the complicated transactions of modern business have given rise to much litigation which grew of the attempted delivery of instruments in escrow. By the Touchstone an escrow is defined to be "where one doth make and seal a deed and deliver it unto a stranger, until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed."² It will be observed that only a deed is referred to in this definition; but the instrument may be of some other character, as a mortgage or note.³

2. The instrument must be duly "made and sealed," being upon its face a complete contract requiring nothing but delivery to make it perfect according to the intention of the parties.⁴

3. The delivery must be to some third person who is a "stranger" to the transaction, and not to the grantee himself.⁵ If the instrument is placed in the hands of the grantee himself by the grantor, even with the express condition annexed, that it is delivered as an es-

crow, to be without effect until the conditions be performed, it will, nevertheless, take effect from the delivery as his deed, and the grantee is under no legal obligation to perform the conditions.⁶ A delivery to an agent of the grantee will have the same effect. Thus, a president of a corporation can not hold the stock of the company in escrow.⁷ But it has been held that a delivery to a director of a railway company, even though he have a limited or *quasi* agency in behalf of the company to procure the execution of its notes and mortgages, will be good as an escrow.⁸ So it has been frequently decided that a bond may be delivered in escrow to a co-obligor, even though such obligor be the principal bondsman.⁹ But it can not be delivered to one of several co-obligees, as a delivery to one is a delivery to all.¹⁰

The question whether the agreement of a surety with his principal, that a bond which he has signed shall not be delivered to the obligee until other signatures are secured, will be regarded as creating an escrow, and thus relieve the surety from liability, in case the condition is not performed, has been prolific of litigation, and the conclusions of the various tribunals have not been altogether uniform. A number of cases hold that if the condition is not performed, the surety will not be bound, and especially when the instrument is incomplete upon its face.¹¹ But the

¹ 14 Henry VII. 42; Henry VIII. 28.

² Sheppard's Touchstone (Preston's ed.), 50.

³ Foy v. Blackstone, 31 Ill. 528; Henshaw v. Dutton, 50 Mo. 139; Andrews' Adm'r. v. Thayer, 30 Wis. 228; Taylor v. Thomas, 13 Kan. 217.

⁴ State v. Potter, 63 Mo. 212; Deardorff v. Foreman, 14 Am. Law. Reg. 551; Hicks v. Goode, 12 Leigh. (Va.) 479.

⁵ Sheppard's Touchstone, 50; Whyddon's Case, Cro. Eliz. 520; Fairbanks v. Metcalf, 8 Mass. 230-232; Brown v. Reynolds, 5 Sneed. 639; Cincinnati, etc. R. Co. v. Duff, 13 Ohio St. 235; Jordan v. Pollock, 14 Ga. 145; Graves v. Tucker, 18 Miss. 9; Worrall v. Munn, 6 N. Y. 229; Braman v. Bingham, 26 N. Y. 483; Lawton v. Sayer, 11 Barb. 349; Hogood v. Harley, 8 Rich. (S. C.) 325; Gilbert v. North American F. Ins. Co., 20 Wend. 43; Fireman's Ins. Co. v. McMillen, 29 Ala. 147; Jayn v. Gregg, 42 Ill. 413; Dawson v. Hall, 2 Mich. 390. As to conditional delivery of bonds, see Hawkland v. Gatchel, Cro. Eliz. 835, which is denied in Thoroughgood's Case, 9 Rep. 137.

⁶ *Supra* note 4; Worrall v. Munn, 1 Seld. 229; Herdman v. Bratten, 2 Harr. 396; State v. Crisman, 2 Ind. 126; M. & Ind. Plank Road Co. v. Stevens, 10 Ind. 1; Paulding v. United States, 4 Cr. 219; Black v. Shreve, 13 N. J. 457; Loyd v. Geddings, 7 Ohio, 375; State v. Potter, 63 Mo. 212; Jones v. Shaw, 67 Mo. 667; Massman v. Holscher, 49 Mo. 87; Truman v. McCollum, 20 Wis. 379; Ordinary of New Jersey v. Thatcher, 12 Vroom, 403; s. c., 32 Am. Rep. 225. But see Bibb v. Reid, 3 Ala. 88.

⁷ M. & Ind. Plank Road Co. v. Stevens, 10 Ind. 1; Foyle v. Cowgill, 5 Blackf. 18; Wight v. Shelby, etc. R. Co., 16 B. Mon. 4; Life Ins. Co. v. Cole, 4 Fla. 359.

⁸ Andrews v. Thayer, 30 Wis. 228; Andrews v. Powers, 30 Wis. 236.

⁹ Ordinary of New Jersey v. Thatcher, 12 Vroom, 403; s. c., 32 Am. Rep. 225; State Bank v. Evans, 15 N. J. L. 155; Black v. Lamb, 1 Beas. 108; Duncan's heirs v. United States, 7 Pet. 435; Roberts v. Jackson, 1 Wend. 478; Pawling v. United States, 4 Cranch. 219; Blum v. Bowman, 2 Ired. L. 338; Fertig v. Bucher, 3 Pa. St. 308; Bibb v. Reid, 3 Ala. 88; Fletcher v. Austin, 11 Vt. 448.

¹⁰ Moss v. Riddle, 5 Cranch. 351; State v. Crisman, 2 Ind. 126; Blum v. Bowman, 2 Ired. L. 338; Perry v. Patterson, 5 Humph. 133.

¹¹ Ayer v. Miltroy, 53 Mo. 516; Preston v. Hall, 23 Gratt. 600; Johnson v. Baker, 4 B. & Aid. 440; Fletcher v. Austin, 11 Vt. 447; State Bank v. Evans, 15 N. J.

weight of authority seems to be in favor of the doctrine that such a delivery is absolute and will bind the surety.¹² Judge Redfield,¹³ in considering this question, says: "And it seems to us, upon principle, that where there is nothing upon the face of the paper, indicating that other co-sureties were expected to become parties to the instrument, and no facts brought to the knowledge of the obligee, before he accepts the instrument, calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault can not be said to rest, to any extent, upon the obligee. And, on the other hand, where the surety intrusts the bond to the principal obligor in perfect form, with his own name attached as surety, and nothing upon the paper to indicate that any others are expected to sign the instrument in order to give it full validity, against all the parties, he makes such principal his agent to deliver the same to the obligee, because such is the natural and ordinary course of conducting such transactions. And if the principal, under such circumstances, give any assurance to the surety in regard to securing other co-sureties, or performing any other conditions before he delivers the bond, and which he fails to perform, the surety giving confidence to such assurances, must stand the hazard of their performance, and can not implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security."

If the grantor hand the instrument to the grantee for the the purpose and with the mutual understanding that it is to be deposited with some third person as an escrow, no in-

terest will vest in the grantee while it is in transit.¹⁴

4. No Particular Technical Words of Delivery are Necessary.—If the actions of the parties negative the intention to regard the instrument as a present deed it is sufficient. Nor is the use of the word escrow essential.¹⁵ A delivery with words similar to the following would create an escrow: "I deliver this to you as an escrow, to deliver to the party mentioned, as my deed, upon condition that he deliver to you £20 for me, or upon condition that he deliver up the old bond he holds of mine for the same money." But if the instrument be delivered with the words: "I deliver this to you as my deed, to deliver to him to whom it is made, when he comes to London;" this is a present grant, and the title vests in the grantee, whether he ever comes to London or not. Whether a delivery is a present grant or an escrow, depends upon the intention of the parties. If the second delivery is to depend upon a condition, it is an escrow; if otherwise, it is a present grant, even though time is to elapse, as until the death of the grantor.¹⁶ In *Prutsman v. Baker*,¹⁷ Chief Justice Dixon said: "Many, and perhaps most of the authorities make a distinction between cases where the future delivery is to depend upon the payment of money, or the performance of some other

¹⁴ *Jackson v. Sheldon*, 22 Me. 569; *Gilbert v. North American F. Ins. Co.*, 23 Wend. 43; *Murray v. Stair*, 2 B. & C. 82; *Den v. Partee*, 2 Dev. & B. 530; *Supra*, note 4. But see *Braman v. Bingham*, 26 N. Y. 483. A deed executed by a sheriff and delivered by him to the attorney of the purchaser, to be delivered to the grantee on payment of the purchase money, is an escrow, and until the condition is performed, the estate continues in the execution debtor. *Jackson v. Catlin*, 2 Johns. 248; *Robins v. Bellas*, 2 Watt. 359.

¹⁵ *Sheppard's Touchstone*, 58-59; *Jackson v. Catlin*, 2 Johns. 248; *Fairbank v. Metcalf*, 8 Mass. 230-238; *Jackson v. Sheldon*, 22 Me. 569; *White v. Bailey*, 14 Conn. 271. Where a conveyance of land and a bond and mortgage to secure the purchase money were left "as escrows," subject to the direction of the parties: Held, not an escrow. *James v. Vanderhayden*, 1 Paige, 385; *Stinson v. Anderson*, 96 Ill. 373.

¹⁶ 3 *Washburn Real Prop.* 301, citing *Foster v. Mansfield*, 3 Met. 414; *Price v. P.*, Ft. W. & C. R. Co., 84 Ill. 13; *Fowley v. Dibble*, 2 Hill, 641; *Braman v. Bingham*, 26 N. Y. 483; *Hathaway v. Payne*, 34 N. Y. 106.

¹⁷ *Prutsman v. Baker*, 30 Wis. 644; s. c., 11 Am. Rep. 582; *State Bank v. Evans*, 15 N. J. L. 155. In *White v. Bailey*, 14 Conn. 271, it was said that the question whether a deed was delivered as an escrow, was a fact for the jury to decide. A deed left to be acknowledged is not an escrow. *White v. Williams*, 8 N. J. Eq. 376; *Foster v. Mansfield*, 3 Met. 412; *Hatch v. Hatch*, 9 Mass. 310.

L. 155. See *Pawling v. United States*, 4 Cranch. 219, and *Moss v. Riddle*, 5 Cranch. 37; *Bibb v. Reid*, 3 Ala. 88. See *Seely v. People*, 27 Ill. 173, holds that where a name had been forged, a surety signing after such forgery would not be bound. Where one surety signed with the understanding that another name was to be obtained, and the other party refused to sign, the surety is not bound. *Leaf v. Gibb*, 4 C. & P. 466.

¹² *Deardorff v. For-man*, 24 Ind. 481; *State v. Potter*, 31 Ind. 76, overruling the same case in 22 Ind. 399; *Blackwell v. State*, 26 Ind. 204; *State v. Crisman*, 2 Ind. 126; *Webb v. Beard*, 27 Ind. 368; *Millett v. Palker*, 2 Met. (Ky.) 608; *Taylor v. Craig*, 2 J. J. Marshall, 449; *Bank v. Curry*, 2 Dane, 143; *Smith v. Mosberly*, 10 B. Mon. 266; *Passumpsic Bank v. Gass*, 31 Vt. 315; *Dixon v. Dixon*, 3 Vt. 450.

¹³ 11 Am. Law Reg. 402.

condition, and cases where it is to depend on the happening of some contingency, holding that the former is an escrow, but that the latter will be deemed the grantor's deed presently. This distinction will be found, however, not to be in all cases correct, since it will frequently happen that it will defeat the manifest intention of the parties which it is conceded should govern."

A statement by the grantee that he delivers it as his deed, even though he afterwards adds a condition, strongly indicates an intention that it shall take immediate effect. "Such a declaration however, is," said Sunderland, J.,¹⁸ "I apprehend, but matter of evidence to be weighed in connection with the other circumstances of the case in order to determine the real character of the transaction."

5. Of the Second Delivery.—The depositary is regarded as the agent of both parties. He is hence as much bound to deliver the instrument to the grantee when the condition is performed, as he is to withhold it until such performance. Consequently, no formal delivery to the grantee is necessary, as upon the condition being performed it is already in the possession of the grantee's agent.¹⁹ The necessity of the second delivery may, however, be created by the words of the first. "Whether an actual delivery to the grantee is necessary in order to give effect to the instrument as the deed of the grantor, seems not to be well settled, but the inference would appear to be that it is not. The indication from the authorities quite clearly is, that it becomes the grantor's deed the moment the conditions have been performed, or the event has happened upon which the grantee is entitled to the possession of it, and that henceforth the depositary, or holder, is regarded as the mere agent, or trustee, for the grantee."²⁰

6. No Title can be Acquired by a Delivery before the Conditions are Performed.—An instrument thus delivered is not the deed of the grantor, and can have no effect as such.²¹

¹⁸ Clark v. Gifford, 10 Wend. 310-313, and authorities cited. A conveyance deposited with the agreement that it is to be delivered back to the grantor upon the performance of some condition by him, as give the grantee certain security for a debt, is an escrow. Raymond v. Smith, 5 Conn. 555.

¹⁹ Shirley v. Ayers, 14 Ohio, 307; 3 Washb. on Real Prop. 272; 4 Cruise. Dig. (Greenf.) 73-74.

²⁰ Prutsman v. Baker, *supra*.

²¹ Perkins, sec. 39, but see sec. 144; Stiles v. Brown,

No title can pass until the conditions are performed.²² There is a conflict of opinion as to the right of an innocent purchaser from a grantee who has obtained possession of the escrow without performing the conditions. Some cases hold that a *bona fide* purchaser, ignorant of the fact, will be protected.²³ But the better opinion seems to be that such a purchaser acquires no title. It is as though the deed were stolen, and must be distinguished from the case where the deed is obtained by fraud from the grantor himself.²⁴ Such an instrument may, however, be used as evidence of a contract to sell and purchase land, and thus have an effect as a writing signed by the parties.²⁵

7. An escrow takes effect as a deed from the second delivery, or from the time when the conditions are performed, and becomes

16 Vt. 563-564; Jackson v. Sheldon, 22 Me. 569; State Bank v. Evans, 15 N. J. L. 155; Rhodes v. Gardiner, 30 Me. 110; Berry v. Anderson, 22 Md. 36; Carter v. McClintock, 29 Mo. 464. See Hooper v. Ramsbottom, 6 Taunt. 12.

²² Dyson v. Bradlaw, 23 Cal. 528; Jackson v. Rowland; 6 Wend. 696; Carr v. Hoxie, 5 Mason, C. C. 60; Green v. Pulman, 1 Barb. 500; Smith v. S. R. Bank, 32 Vt. 341; Townsend v. Hawkins, 45 Mo. 285; Curtis v. Mills, 30 Mo. 432; Everts v. Ayres, 29 Wis. 343; Abbott v. Alsdorf, 19 Mich. 157.

²³ Blight v. Schenk, 10 Pa. St. 285; Pratt v. Holman, 16 Vt. 530; Peter v. Wright, 6 Ind. 183. See Berry v. v. Anderson, 22 Ind. 36.

²⁴ Fisher v. Beckland, 30 Wis. 55; Titus v. Phillips, 3 C. E. Green, 540; Smith v. Royalton Bank, 32 Vt. 341; People v. Bostwick, 32 N. 450; Ill. Cent. R. Co. v. McCullough, 59 Ill. 178; Dyson v. Bradshaw, 23 Cal. 536; Abbott v. Alsdorf, 19 Mich. 157; Kellogg v. Steiner, 29 Wis. 629; Walker v. Egbert, 29 Wis. 194; Southern Ins. Co. v. Cole, 4 Fla. 359. Where the deed is delivered to the agent of the grantee to be delivered upon the performance of certain conditions, and accepted by the agent upon these conditions, the delivery will not affect the title until the conditions have been performed. Cincinnati, etc. R. Co. v. Hiff, 13 Ohio St. 235. In Burson v. Huntington, 21 Mich. 415; C. S. 4 Am. Rep. 497, the facts were as follows: A executed a note in favor of B, and B obtained possession of it contrary to the directions of A, and put it in circulation. Mr. Justice Christiancy said: "We, therefore, see no ground upon which the defendant could be liable on a note thus obtained, even to a *bona fide* holder for value. * * * We have carefully examined the cases, English and American, and are satisfied there are no adjudged cases in the English courts, so far as their reports have reached us, which could warrant a recovery on the present case. Some *dicta* may be found, the general language of which might sustain the liability of the maker; such as that of Alderson, Baron, in Marston v. Allen, 8 M. & W. 494, cited by Duer, J., in Gould v. Segee, 5 Duer, 260, and that used by Williams, J., in Ingham v. Primrose, 7 C. B. (N. S.) 82. But a reference to the cases will show that no such question was involved, and that these remarks were wholly outside the case."

²⁵ Coggers v. Lansing, 57 Barb. 421.

the deed of the party from that time.²⁶ For many purposes, however, it relates back to the first delivery, and is the consummation of an inchoate act. This exception to the general rule is necessary in order to prevent the intention of the grantor from being defeated by any intervening incapacity. The second delivery, in fact, has all its force by virtue of the first, and is but an execution and consummation of it. In *Butler and Baker's Case*, it was said that, "if, at the time of the first delivery, the lessor be a *feme sole*, * * * and before the second delivery, she dieth; in this case, if the second delivery shall not have relation to the intent, to make it the deed of the lessor, *ab initio*, but only from the second delivery, the deed in both cases should be void; and therefore, in such case, for necessity, and *ut res magis valeat*, to this intent, by fiction of law, it shall be a deed *ab initio*; and yet, in truth, it was not a deed until the second delivery."²⁷

But if, at the time of the first delivery, the grantor was under some legal disability, as an infant or a *feme covert*, the second delivery, although made after such disability was removed, gives no validity to the deed.²⁸ If, at any time between the first and second delivery, the property is levied upon by a creditor of the grantor, he will hold by virtue of such levy in preference to the grantee mentioned in the deed.²⁹ So the second delivery carries with it no right to the intermediate rents.³⁰

8. The delivery of a deed in escrow will not take a sale out of the statute of frauds,

the terms of the contract not appearing from the deed.³¹ The conditions upon which the escrow was to be delivered may rest in and be proved by parol, but unless there was a valid contract for the sale and purchase of the land described in the deed, such a deposit would be the mere voluntary act of the grantee, and could in no manner affect his control over the instrument. An actual contract of sale on the one side and of purchase on the other, is essential.³² The making of a deed in escrow presupposes a contract, in pursuance of which the deposit is made.³³

In *Campbell v. Thomas* there was a verbal agreement by the plaintiff to purchase, and by the defendant to sell on certain terms, which included the execution of a mortgage on the land to secure the payment of the purchase money. It was held that such verbal agreement was a nullity, there having been no such part performance of the contract as would take it out of the statute of frauds, and that the grantor never lost his control over the deed. On the other hand, it has been maintained that "it is not true that a person must be under a previous binding executory contract to convey the land described in the deed to the grantee, in order to place, the deed thereof, delivered to a third person for the grantee, beyond the control of the grantor." This was vigorously argued in *Campbell v. Thomas*, at two different hearings. Chief Justice Ryan, in delivering an opinion, said: "I have no doubt that an escrow may be proved by parol. The difficulty here is not in the proof of the alleged escrow, but in the proof of the contract of sale and purchase itself. When there is a valid contract under the statute, the papers constituting it, or executed in compliance with it, may be delivered in escrow, and the escrow may be proved by parol. But the validity of the escrow rests on the validity of the contract; and the validity of the contract rests on the statute." There is, however, a certain class of cases in which no such executory contract is necessary; as where a deed is deposited with a third person, with instructions to deliver the same to the grantee upon the event of the

²⁶ Perkins, sec. 143; Touchston's, 59; Butler and Baker's Case, 3 Rep. 36; Green v. Pulmans, 1 Barb. 500; Frost v. Beckman, 1 John. Ch. 287; Everts v. Ayres, 4 Wis. 357; James v. Vanderheyden, 1 Paige, 385.

²⁷ Butler and Baker's Case, 3 Rep. 36; 3 Preston's Abst. 68; Burryman's Case, 5 Rep. 84; Perkin's, secs. 11, 138, 140; Touchstone, 59; Jackson v. Catlin, 2 Johns. 248; Hatch v. Hatch, 9 Mass. 307-310; Jackson v. Rowland, 6 Wend. 666; Holford v. Palker, Hob. 243a, and William's note; Shirley v. Ayres, 14 Ohio, 309; Ruggles v. Lawson, 13 John. 255. See Carr v. Hoxei, 5 Mason, 60; Evans v. Gibbs, 6 Humph. 405; Frost v. Beckman, 1 Johns. Ch. 288; Hall v. Harris, 5 Ired. Eq. 303; Price v. Pittsburgh, etc. R. Co., 34 Ill. 36; Miller v. Palker, 2 Met. (Ky.) 61; Prutman v. Baker, 30 Wis. 344, s. c., 11 Am. Rep. 579.

²⁸ Butler and Baker's Case, 3 Rep. 34; Jennings v. Bragg, Cro. Eliz. 47.

²⁹ Jackson v. Rowland, 6 Wend. 666; Frost v. Beckman, 1 Johns. Ch. 288; Jackson v. Catlin, 2 Johns. 248.

³⁰ Perkins, sec. 10; 2 Prest. Abst. 65.

³¹ Thomas v. Seward, 25 Wis. 630, 636; Campbell v. Thomas, 42 Wis. 437.

³² Fitch v. Bunch, 30 Cal. 208.

³³ Stanton v. Miller, 55 N. Y. 192.

grantor's death;³⁴ but the general rule is as stated above.

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³⁴ *Goodell v. Pierce*, 2 Hill, 659; *Ruggles v. Lawson*, 13 Johns. 284; *Tooley v. Dibbles*, 2 Hill, 241; *Hatch v. Hatch*, 9 Mass. 309.

SPECIFIC PERFORMANCE OF PAROL CONTRACTS RELATING TO LANDS.

The question very frequently arises under what circumstances a court of equity will enforce parol contracts in regard to land. That equity has jurisdiction over such contracts in some cases has become a well established rule,¹ and what some of these circumstances are is the object of this article to consider. We shall confine our discussion to the questions of admissions of the defendant and to part performance of the contract.

As the object of the statute of frauds was to prevent perjury and fraud, at first the courts were inclined to grant specific performance in those cases where there could be no possibility of perjury and fraud being committed. For this reason, if the defendant admitted the agreement as set up in the complainant's bill, the courts were inclined to grant the specific performance sought.² In *Child v. Godolphin*, the ground of decision seemed to be that the confession of the defendant was sufficient to prevent any fraud arising from perjury, and, as that was the object of the statute, no harm could be done by decreeing a specific performance of the contract.³ Story suggests that another reason might be that although the contract was originally by parol, it became sufficiently evidenced by writing under the signature of the party confessing the agreement.⁴ There seems to have been quite a conflict of opinion, not only in the United States but also in England, in regard to the question whether or not the admission of the defendant in his answer was sufficient to take the case out of the statute. It has been held in Pennsylvania that a parol sale of land without delivery of possession would be supported when

sustained on trial by the oath of the vendor.⁵ But in both of these cases there was an express implication that if the defendant had pleaded the statute of frauds, although admitting the agreement, the plea would have barred specific performance.

The early English decisions were generally in favor of granting specific performance on the admission of the defendant, although he pleaded the statute of frauds.⁶ Lord Maclesfield said: "If the defendant confessed the agreement, the court would decree specific performance, notwithstanding the statute; for such confession would not be looked upon as perjury, or intended to be prevented by the statute."⁷ The chancellor was very positive in his opinion that if the statute be pleaded the agreement must be denied, otherwise the decree for specific performance would be granted.

On the other hand, there are a large number of cases where specific performance was refused even when the agreement was admitted, if the statute were pleaded.⁸ Sir William Grant decided that the admissions of the defendant did not take the agreement out of the statute.⁹ In general, if the defendant would take advantage of the statute after admitting the contract he must plead it, otherwise he will be regarded as having admitted a legal contract.¹⁰ But if the statute be pleaded, although the agreement be admitted, the contract will not be enforced.¹¹

There has been no less conflict in this country on this question than in England. It has been held that if the vendor in his answer admitted the agreement, or did not deny it, the case was taken from the statute.¹² In Missouri, the Supreme Court held that a defendant can insist on the statute of frauds, although he admit the agreement in his an-

⁵ *Christy v. Brien*, 2 Harris, 248; *Houser v. Lamont*, 55 Pa. St. 31.

⁶ *Child v. Godolphin*, *supra*; 1 Sug. on Ven. (9th London ed.), 127; *Croyston v. Barnes*, Prec. Ch. 208; *Wanby v. Sawbridge*, 1 Bro. C. C. 414.

⁷ *Child v. Godolphin*, *supra*.

⁸ *Whitchurch v. Bevis*, 2 Bro. C. C. 559; S. C., 2 Dick. Ch. 664; *Walters v. Morgan*, 2 Cox, 369.

⁹ *Blayden v. Bradbear*, 12 Ves. Jr. 464.

¹⁰ *Lymondson v. Tweed*, Prec. Ch. 374; *Osborn v. Endicott*, 6 Cal. 149; *Tilton v. Tilton*, 9 N. H. 385; *Woods v. Dille*, 11 Ohio. 455; *Harris v. Knickerbocker*, 5 Wend. 638; *Cooth v. Jackson*, 6 Ves. 39.

¹¹ *Thompson v. Tod*, 1 Pet. C. C. 388; *Stearnes v. Hubbard*, 8 Greenlf. 320; *Moore v. Edwards*, 4 Ves. 32.

¹² *Auter v. Miller*, 18 Iowa, 405.

¹ 2 Story's Eq. Jur., sec. 759.

² *Child v. Godolphin*, 1 Dick. Ch. 39; *Whitchurch v. Bevis*, 2 Bro. Ch. 566.

³ 1 Dick Ch., 39.

⁴ 1 Story's Eq. Jur., sec. 755.

swer.¹³ In Georgia the court held that if the defendant admitted the agreement without pleading the statute, specific performance will be granted.¹⁴ And this seems to be the rule in Maryland.¹⁵ In South Carolina the earlier English decisions are followed. In one case the court said: "The court has no difficulty in decreeing the agreement to be specifically executed, for the defendant by his answer, which he signed, having acknowledged the agreement, the court considers it such an assent in writing as overrules his plea of the statute of frauds."¹⁶ Hence we may safely say that now the prevailing doctrine in England and the United States is, that if the defendant admit the agreement without pleading the statute of frauds, a parol contract relating to land will be specifically enforced, but if the statute be pleaded, his admission will not be any advantage to the complainant.¹⁷

A court of equity will enforce a parol contract in regard to real estate where there has been partial performance. The question now arises what is such a partial performance as will entitle the complainant to specific performance? In general we may say that partial performance is such a carrying out of the contract on one side that there would be fraud unless the other party were compelled to perform his agreement.¹⁸ In some of the early cases, before the statute was passed, equity would enforce parol contracts for the sale of land when only a small part of the purchase money was paid.¹⁹ But in another case under nearly the same circumstances the bill for specific performance was dismissed.²⁰ However, it seems that in the cases where specific performance had been granted on the payment of a sum of money, it was on the ground that the bill had not been demurred to.²¹

After the passage of the statute of frauds,

not even the payment of a large sum could be regarded as a part performance.²² But the party could, in equity, recover the money back.²³ In *Main v. Milbourne*, the court held that the payment of earnest money would not take the case out of the statute, but plainly implied that the payment of a substantial part of the purchase money would.²⁴ But Sir William Grant decided that not even the payment of a considerable part of the purchase money was sufficient to take the contract out of the statute.²⁵ The doctrine is well established now, that the payment of money merely is not such a part performance as will entitle the complainant to a specific performance.²⁶ In some instances, the giving up of possession will take a parol agreement out of the statute.²⁷ But the possession must be given under the contract, and if it can be traced to any title distinct from the agreement, it is not sufficient.²⁸ In *Morphett v. Jones*, the Master of the Rolls said: "Between landlord and tenant, when the tenant is in possession at the date of the agreement and only continues in possession, it is properly observed that in many cases that amounts to nothing; but admission into possession having unequivocal reference to the contract, has always been considered as an act of part performance."²⁹

The acknowledged possession of a stranger in the lands of another, is strong evidence of an antecedent contract, and authorizes a court to inquire into its terms, and if the contract can be sustained, it will be specifically performed.³⁰ Possession obtained wrongfully can not take the case out of the statute.³¹ If the tenant hold possession under a different agreement than formerly, as by paying a higher rent, making improvements, making payments at different periods, or any other change showing a new contract, the case is

¹³ *Lockett v. Williamson*, 37 Mo. 388.

¹⁴ *Kirksey v. Kirksey*, 30 Ga. 156.

¹⁵ *Artz & Wife v. Grove*, 21 Md. 456; *Winn v. Albert & Wife*, 2 Md. Ch. 109; *Worley v. Walling*, 1 H. & J. 209.

¹⁶ *Smith v. Brailsford*, 1 Des. 350.

¹⁷ *Thompson v. Tod*, 1 Pet. C. C. 388; 1 Story's Eq. Jur., sec. 757, and cases cited; *Brayden v. Bradbear*, 12 Ves. 47.

¹⁸ 2 Story Eq. Jur., 60; *Fonbl. Eq.* 26; *Tilton v. Tilton*, 9 N. H. 390.

¹⁹ *Ferne v. Bullock*, Toth. 206; *Clark v. Hackwell*, Id. 228; *Anon.*, 2 Freem. 128.

²⁰ *Miller v. Blundist*, Toth. 85.

²¹ *Voll v. Smith*, 3 Ch. Rep. 16; *Anon.*, 2 Freem. 128.

²² 1 Freem. 486.

²³ 1 Sugd. Ven. 140 (9th Lon. ed.).

²⁴ 4 Ves. Jun. 720.

²⁵ *Butcher v. Butcher*, 9 Ves. Jun. 382.

²⁶ 2 Story Eq. Jur., sec. 700; 1 Sugd. Ven. 146 (9th Lon. ed.); *Cronk v. Trumble*, 66 Ill. 428.

²⁷ 1 Sugd. Ven. 135 (9th Lon. ed.); *Winan v. Belknap*, 2 Johns. 573; *Fox v. Longly*, 1 Marsh. (Ky.) 388; *Downey v. Hotchkiss*, 2 Day, 225.

²⁸ 1 Sugd. Ven. 136 (9th Lon. ed.).

²⁹ 1 Sw. 181. See, also, *Parkhurst v. Vancortlandt*, 14 Johns. 15; *Cole v. White*, 1 Bro. C. C. 409.

³⁰ *Morphett v. Jones*, 1 Sw. 181.

³¹ *Givins v. Givins*, 2 Des. 171.

taken from the statute.³² However, a tenant from year to year laying out money for the usual improvements in such cases, can not claim such acts as part performance.³³ When delivery of possession is to be set up as a part performance, the whole land in controversy must have been given up, as delivery of a part only will not avail against the statute.³⁴ It has been held that if the purchaser take possession in accordance with the agreement, the mere fact that he makes improvements will not take the case out of the statute, but there must be a payment of the purchase money.³⁵ But this opinion seems to be in conflict with other opinions, where it is held that making improvements is equivalent to paying a valuable consideration, and entitles the donee to specific performance.³⁶

In Mississippi, partial performance will not take a parol contract, relating to land, out of the statute. Peyton, J., in delivering the opinion of the court on this point said: "This court has repeatedly decided that a bill to enforce a parol contract for the sale of land, can not be maintained in this State, and that part performance will not take a parol sale of lands out of the statute of frauds. The statute contains no exception in regard to such contracts, and it is not for us to make exceptions where none exist in the statute.³⁷ The same doctrine seems to prevail in Tennessee.³⁸ The earlier doctrine in Massachusetts was that part performance would not take a parol contract for the sale of land out of the statute of frauds;³⁹ but the courts now seem to be a little more liberal.⁴⁰

Acts that are introductory to an agreement can not be regarded as part performance, no matter how great the expense may have been in regard to them. Hence, getting out abstracts, measuring the land, drawing up conveyances, making valuations, etc., are not of

the nature that a court of equity will regard them as part performance.⁴¹ That a part performance may take a parol contract relating to lands out of the statute, it is necessary that the acts done should refer exclusively to the contract, and the contract itself must be clear and definite in its terms.⁴² So, too, the refusal of one party to perform his part of the contract, after the other has partly performed his, must work a fraud upon the latter to have the contract carried out by a decree of the court.⁴³ The contract proven must be the same in every material point as the one stated in the bill, or the court will refuse to decree specific performance. Kent, J., in *Phillips v. Thompson*, says: "Unless the plaintiff has clearly established the contract charged, and also a part performance of the same contract, he has not entitled himself to the relief sought."⁴⁴ A court will not specifically perform an agreement with a variation.⁴⁵ Nor if the plaintiff fails to make out the agreement charged, can he resort to the one confessed in the defendant's answer.⁴⁶

However lax courts may have been in former times, and however willing to overrule the statute whenever a case of peculiar hardship comes up, it now seems to be the prevailing opinion among text writers and courts, that the better and juster way is for the courts to insist as strongly as possible in having the provisions of the statute complied with, and that the fewer the exceptions that are made the better. Such a rule, rigidly enforced, would certainly bring about a more careful method of dealing in interests in lands, and do away with a large number of the cases that are continually coming before the courts for adjudication, and this seems to be the course that the courts are taking.⁴⁷

Detroit, Mich.

ISAAC N. PAYNE.

³² 1 Story Eq. Jur. sec. 763 and cases cited; *Wills v. Stradling*, 3 Ves. 378.

³³ *Fry on Spec. Per.* 253; *Brennan v. Bolton*, 2 Dr. & W. 349.

³⁴ *Pugh v. Goods*, 3 Watts & Serg. 56; *Allen's Estate*, 1 Watts & Serg. 383.

³⁵ *Holmes v. Holmes*, 44 Ill. 162.

³⁶ *Kurtz v. Kurtz*, 55 Ill. 514; *Bright v. Bright*, 41 Ill. 97; *Shepherd v. Bevin*, 9 Gill. 32; *King's Heirs v. Thompson*, 9 Pet. 204.

³⁷ *McGuire v. Stevens*, 42 Miss. 724. See, also, *Beaman v. Buck*, 9 S. & M. 210; *Box v. Stanford*, 18 S. & M. 93.

³⁸ *Patton v. McClure*, 1 Mart. & Yerg. 333.

³⁹ *Buck v. Dowley*, 16 Gray, 555.

⁴⁰ *Glass v. Hulbert*, 102 Mass. 24.

⁴¹ 1 Sugd. Ven. 135 (9th Lon. ed.); *Clark v. Wright*, 1 Atk. 12; *Frame v. Dawson*, 14 Ves. 386; *Davenport v. Mason*, 15 Mass. 85; *Phillips v. Thompson*, 1 Johns. Ch. 131.

⁴² 2 Story Eq. Jur. sec. 764; *Carlisle v. Fleming*, 1 Harring. Ch. 421; *Harris v. Knickerbocker*, 5 Wend. 638; *Crocker v. Higgins*, 7 Conn. 342.

⁴³ *Fry on Spec. Perf.*, 254; *Buckmaster v. Dunop*, 7 Ves. 246; *Mundy v. Jolliffe*, 5 My. & Cr. 177.

⁴⁴ 1 Johns. Ch. 146.

⁴⁵ *Jordan v. Lawkins*, 4 Brown's Ch. 477.

⁴⁶ *Harris v. Knickerbocker*, 5 Wend. 638; *Segal v. Miller*, 2 Ves. Sen. 299.

⁴⁷ *Phillips v. Thompson*, 1 Johns. Ch. 149; *Boardman v. Mostyn*, 6 Miss. 467; 1 Story Eq. Jur. sec. 765; *O'Reilly v. Thompson*, 2 Cox, 271; *Forster v. Hale*, 3 Ves. 712; *Harnett v. Yielding*, 2 Sch. & Lefr. 549.

STATUTORY ENACTMENT — ENROLLED BILL — LEGISLATIVE JOURNALS AS EVIDENCE — ENROLLED STATUTE CONCLUSIVE AGAINST AN AMBIGUOUS JOURNAL.

IN RE VANDEBERG.

Supreme Court of Kansas, July Term, 1882.

The enrolled statute is very strong presumptive evidence of the regularity of the passage of the statute and of its validity, and it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt, that the act was not passed regularly and legally. If there is any room to doubt as to what the journals of the legislature show, if they are merely silent and ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid.

Original proceedings in *habeas corpus*.

J. G. Mohler and C. A. Hiller, for the petitioner; *W. A. Johnston Atty. Gen.*, and *David Rathbone*, for the respondent.

HORTON, C. J., delivered the opinion of the court:

The question in this case is, whether the conviction and sentence of the petitioner, Franklin Vandenberg, in the district court of Ellis county at the April term for 1882, were absolutely void.

It is alleged on the part of the petitioner that there is not, and never was, any Seventeenth Judicial District in this State; that Ellis county, at the date of the conviction and sentence was, and continues to be, a part of the Fourteenth Judicial District of the State; that W. H. Pratt was not the regular judge of the Fourteenth Judicial District, nor the judge *pro tem.* of said district, nor the judge *de jure* or *de facto* of any court or district; that at the time he was holding court in Ellis county, the regular term of the district court of Lincoln county, one of the counties comprising the Fourteenth Judicial District, was being held as required by law by J. H. Prescott, the elected judge of that county and district; that all the proceedings, acts and things done and pretended to be done at the April term of the court of Ellis county for 1882, towards restraining and depriving the petitioner of his liberty, were and are wholly illegal and unauthorized. The alleged grounds for this contention are twofold: First, that chapter 100, Laws of 1881, entitled, "An act to create the Seventeenth Judicial District, to provide a judge therefor and for holding terms of court therein," can not be regarded as a legislative act enforceable by the courts, because it is claimed on the part of the petitioner, that the act on its final passage by the House of Representatives, did not receive the votes of two-thirds of the members thereof, as ordained by the Constitution of the State to be necessary to increase the number of judicial districts. Sec. 14, art. 3, State Constitution.

Second, that chapter 98, Laws of 1881, providing for terms of court in the Fourteenth Judicial District, designates that court shall be held in the county of Ellis on the fourth Monday of March, and the last Monday of September in each year, and is therefore in conflict with chapter 100, Laws of 1881, creating the Seventeenth Judicial District and naming Ellis county as a part thereof, and fixing the time for the holding of courts therein on the fourth Monday of April and the third Monday of October of each year. If we accept the enrolled statute embodying the act now challenged by the petitioner as conclusive evidence of the regularity of the passage of the act and of its validity—as in many of the States the courts decide must be done—we would not be at liberty to inquire into or dispute the enactment or contents of this statute. 13 Cent. L. J. 181. If it were held that the enrolled statute is conclusive of the validity of the act embraced in it, it would be incumbent upon us to hold that the Seventeenth Judicial District had been legally created, and that at the time the sentence was passed upon the prisoner, W. H. Pratt was the judge thereof, both *de jure* and *de facto*. It is said, however, in the opinion of the division of Howard county (15 Kan. 194), that "we take judicial notice without proof of all the laws of our own State. All the courts of the State are required to do this, and in doing this we take judicial notice of what our books of published laws contain." In *State v. Francis*, 26 Kan. 724, it is also stated that "in this State, where each House is required by the Constitution to keep and publish a journal of its proceedings, we can not wholly ignore such journals as evidence, and, therefore, when there can be no room for doubt from the evidence furnished by such journals, that the statute was not passed by a constitutional majority of the members of either House, then the courts may declare that the supposed statute was not legally passed and is invalid." This language of the opinion is qualified, however, as follows: "The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively and beyond all doubt that the act was not passed regularly and legally. If there is any room to doubt as to what the journals of the legislature show; if they are merely silent or ambiguous; or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid." In view of these decisions of our court, we have examined with great care the original House journal of 1881, to ascertain if it establishes "clearly, conclusively and beyond all doubt," that chapter 100 was not regularly and legally passed. The House of Representatives of the State for 1881, consisted apparently of one hundred and thirty-seven persons. At least one hundred and thirty-seven persons took part in the proceedings of the

House. Under the decision of *State v. Francis*, *supra*, as the number of representatives can never exceed one hundred and twenty-five, some of these persons must have been there illegally, and under that decision, the twelve persons from counties who were not provided for by law with numbers or districts, and who were the last members admitted to seats, were not entitled to seats; and any act passed only by the assistance of their votes must be held as not having passed the House of Representatives, and as void. From an examination of the House Journal as published, ninety-three members voted yea and ten nay upon the passage of the act now challenged. In the yeas were included the illegal votes of Davis, Francis, Gates, Hargrave, Keeney, Montgomery, Newby, Stone, Tousley and Turner. Two-thirds of the constitutional members of the House would be eighty-four. If the ten votes of the persons who were illegally admitted to the House were deducted from the total yeas, eighty-three only would remain, and therefore if the journal of the House as printed, was conclusive, it could not be said that two-thirds of the constitutional members of the House concurred in the creation of the Seventeenth Judicial District, and if the printed and published journal of the House was a correct exemplification of the original journal, then, within the language of the opinion in *State v. Francis*, *supra*, we would be bound to say that chapter 100, Laws of 1881, did not receive the votes of a constitutional two-thirds of the members of the House, and therefore that it did not pass the House as prescribed by the Constitution. But our examination of the original journal convinces us that the printed and published journal is not to be taken as conclusive against the validity of the enrolled statute embracing chapter 100. Counsel for the petitioner claim that the original journal shows ninety-two votes only recorded in favor of the passage of the bill. The clerk, in the published journal, counts ninety-three votes recorded for the bill. This difference is proof that the journal is doubtful. The only way the yeas and nays were entered upon the journal of the House upon the passage of the substitute for House bill No. 119, now known as chapter 100, Laws of 1881, was by a printed roll of the names of all the persons admitted as members of the House being attached to the journal, and the names of the persons voting upon the measure being numbered. At least, an attempt was made to enter numbers opposite their names. These numbers opposite the names of persons voting on the first call of the roll increase in a regular progression of ten. The last number of each series of affirmative tens closes with the number sixty, after which five more votes are numbered, running down through the roll, and the first total of sixty-five yeas is indorsed at the foot of the roll. The votes, from sixty-five to ninety-four, were apparently cast on a second call of the roll, or when the members appeared in the hall, as the numerals opposite the names of the affirmative voters from sixty-five to ninety-four,

are scattered irregularly through the roll. It is also apparent that some of the members changed their votes, and the face of the original journal shows different counts and many attempted corrections. At the bottom of the roll the number ninety-four appears, and this number also appears opposite the name of Bennyworth, the member from Pawnee County. It is very evident to us that ninety-four persons voted originally in favor of the passage of the act; that ninety-four votes were numbered and counted by the clerk, or his assistant, as voting in favor of the act, and that this number was announced to the house, and that the house understood that ninety-four votes had been recorded for the bill upon its final passage. This is corroborated not only by the figures ninety-four at the bottom of the roll, and by the figures opposite the name of Bennyworth, but also by the journal kept by the docket clerk, which shows that ninety-four votes were cast in favor of the act. From sixty-five to ninety-four, inclusive, the numbers are regularly set opposite the names of members voting affirmatively, and the numerals ninety-four opposite the name of Bennyworth have never been changed or erased. They stand to-day as a part of the journal of the house. To our mind the natural supposition is, that in the haste of calling the roll, and in the confusion incident to the checking the names of the members voting and the marking of numerals opposite thereto, the name of some person who had voted aye was marked nay, or some member was improperly marked as having changed his vote from aye to nay. Had the numerals ninety-four opposite the name of Bennyworth been changed and corrected to some other number less than ninety-four, we might suppose that the figures ninety-three yeas and ten nays were the true votes given for and against the bill, but as against the enrolled bill, we have no more right to assume that the ninety-four opposite the name of Bennyworth was improperly recorded, than we have to assume that the keeper of the journal committed an error in marking the vote of Schott as changed from aye to nay. To ignore the numerals ninety-four opposite the name of Bennyworth requires us to question the integrity of the journal. If it be discredited as to one name, it falls before the strength of the enrolled bill. Viewing it from any standpoint, upon its face the journal is conflicting and ambiguous. If the act upon its passage received ninety-four votes, striking from the list all of the illegal votes pointed out, still two-thirds of the constitutional members of the house concurred in its passage. As the house is constituted of one hundred and twenty-five members, eighty-four votes was sufficient. In any event, from our personal inspection we can not say that the original journal of the house "shows clearly, conclusively and beyond all doubt" that chapter 100 was not regularly and legally passed. In our opinion, the enrolled statute embracing chapter 100 is too strong evidence of the regularity of the passage of that act, and of its validity, to be over-

thrown and destroyed by the journal, as it now appears in its confused and unascertainable condition. The enrolled statute is not to be set aside upon mere guesses or surmises, nor upon a doubtful interpretation of a journal seemingly contradictory upon its face. Further, chapter 100 is now challenged before us for the first time. This statute has been recognized by both houses of the legislature; has been approved by the governor in the form as it now appears enrolled in the office of the Secretary of State; has been published under the authority of the Secretary of State as a valid statute; has been recognized by the legislature as an existing statute by the act appropriating money for the salary of the judge of the seventeenth judicial district for the years 1881 and 1882; has been acted upon by the chief executive of the State in the appointment and commission of a judge for the seventeenth judicial district; has been recognized by the people of the counties comprising that district by the election of the presiding judge, who passed the sentence upon the petitioner, and this court has upon several occasions examined and affirmed judgments in actions heard and tried by the judges of that district. Under all these circumstances, we do not hesitate to say that we would require the original journal of the house to establish beyond all possible doubt that the act was not concurred in by two-thirds of the constitutional members of the house before we would be willing to disregard and treat it as naught, when it seems to be surrounded and supported by so many appearances of absolute validity.

One thing further as to the conflict between chapter 98 and chapter 100. Both acts were approved March 5, 1881. It is contended on the part of counsel of the petitioner, that chapter 98 was the last expression of the legislative will. Even if this were true, the insertion of Ellis County in chapter 98 was evidently an inadvertence. Chapter 100 created the seventeenth judicial district, and mentions Ellis County as comprising a part thereof. It further provides for the holding of two terms of court in the county for each year. Chapter 98 provides for the terms of the court in the fourteenth judicial district, another and a different district than that in which Ellis County had been located by chapter 100. If it clearly appears from all the sources of interpretation that a provision of a statute has been inserted through inadvertence, it will be disregarded. *Pond v. Maddox*, 38 Cal. 572.

We must, therefore, upon this doctrine disregard the provision relating to Ellis County in chapter 98. Of course, if chapter 100 was the last enactment of the legislature, it would be valid and binding in all of its terms, notwithstanding the provisions of chapter 98, even if none of the provisions thereof had been inserted by inadvertence.

Several other questions have been fully and elaborately presented upon the hearing of this case, but the conclusion obtained makes it unne-

cessary to consider them. Nothing appearing before us upon the record or evidence presented warranting any judgment annulling the conviction of the petitioner, he must be remanded into custody.

All the justices concurring.

BANK—CERTIFICATION OF CHECK, SUBSEQUENTLY RAISED—LIABILITY.

CLEWS v. BANK OF NEW YORK NATIONAL BANKING ASSOCIATION.

New York Court of Appeals.

A check drawn on defendant and sent by mail from Chicago to New York, addressed to D, the payee, was afterwards presented to and certified by defendant. It was thereafter changed by raising the amount and making plaintiffs the payees. The plaintiffs to whom it was presented as so altered were informed by defendant's paying teller, through a messenger, that the certification was good, and they thereupon delivered the bonds and took the check. Before the inquiry by plaintiffs, defendants had been informed of the non-receipt by the payee of the check mailed, a duplicate was asked for, and payment of the original had been stopped. The teller, when the inquiry was made, did not know that the check shown him was the one which had been stopped. *Held*, that as the inquiry related only to the genuineness of the certification, and the attention of the teller was called to nothing else, the teller's answer imposed no greater or broader liability than if the check had then first been presented for certification, and the bank was not liable in an action to recover the amount paid upon the raised check.

Wheeler H. Peckham, for appellant; *Albert A. Abbott*, for respondents.

A check for \$254.50, drawn by the Commercial National Bank of Chicago on the defendant, to the order of D, and by him indorsed to G, and inclosed in an envelop addressed to said G at 805 Broadway, in the City of New York, was deposited in the post office in Chicago. That check was afterwards presented to and certified by the defendant. It was thereafter altered by changing the amount to \$2,540, and the payee to C & Co., and by erasing the indorsement. As so altered it was presented to the plaintiffs in payment for bonds purchased by them. Before taking it plaintiffs sent a messenger to defendant's bank, and asked the paying teller to inform him whether the certification thereof was good. The paying teller answered yes. Thereupon the plaintiffs delivered the bonds and took the check. When the check was presented for payment the forgery was discovered and payment refused. Subsequent to the certification, and before the presentation by the messenger of the plaintiffs, the Chicago bank had written defendant a letter, advising defendant that the check number 73,486, indorsed over to G, and mailed from there to here, had not been received, and that D, the payee, requested a duplicate, and requesting defendant to stop payment

of original. At the time the messenger made the inquiry of the teller the teller did not know that the check shown him was the one for \$254.50, payment of which had been stopped, and answered, in entire good faith, that the certification was good.

EARL, J., delivered the opinion of the court:

The plaintiff did not obtain lawful title to this check, and, therefore, can not enforce payment of it against the defendant, unless it is in some way estopped from denying its liability to pay.

When the defendant certified the check to be good, it assumed a liability like that of an acceptor of a draft. By the certification it guaranteed the genuineness of the drawer's signature, and represented that it had funds of the drawer in its possession sufficient to meet the check, and it engaged that those funds should not be withdrawn from it by the drawer to the prejudice of any *bona fide* holder of the check, and the certification did not impose upon the defendant any further or greater responsibility. It did not import that the body of the check was genuine or that the funds on deposit with it were absolutely applicable to the payment of the precise check certified. When, therefore, a check has been raised by some person without authority before certification, the certifying bank can not be called upon in consequence of its certification to pay the amount of the raised check; and when a bank has thus certified a raised check by mistake, and subsequently pays the money thereon, without any culpable negligence on its part, it can recover the amount thus paid as money paid by mistake. *National Park Bank v. Ninth National Bank*, 46 N. Y. 77; *Marine Bank v. National City Bank*, 59 N. Y. 87; *Security Bank v. National Bank*, 67 N. Y. 458; *Espy v. Bank of Cincinnati*, 18 Wall. 604. Precisely the same rule is applicable to the acceptor of a bill of exchange. By his acceptance he guarantees the genuineness of the drawer's signature but not the genuineness of any other names upon the paper or of the body of the paper in respect to the date and the amount thereof. If any of the names upon the paper other than the drawer's have been forged, or if the body of it has been altered by increasing the amount thereof, and the acceptor, without culpable negligence, pays the bill by mistake, not knowing of the forgery and alteration, he may recover back the amount paid as money paid by mistake, and whether the forgery and alteration were made before or after acceptance can make no difference.

Here it is conceded that if this check had been raised before the certification, that the defendant would not have been bound to pay the same, and that if by mistake it had paid the same it could have recovered the money back. But it is claimed that because the alteration and raising of the check took place after the certification, a different rule applies, and that the defendant, upon the facts of this case, was properly held liable.

It is true that the defendant, when called upon

by the plaintiff's agent before they took the check, could have discovered the alteration; but was it bound to discover it and inform the plaintiff? The agent of the plaintiff called upon the defendant during banking hours, and presented this check to the paying teller and told him that the plaintiff wanted to know if the certification was good, and he looked at it and said yes. At that time the bank owed the plaintiff no duty of active diligence to protect them from the fraud which the holder of the check was trying to perpetrate upon them. It was bound to act in good faith, and not to do anything or say anything intentionally or carelessly which would mislead them, or upon which they could properly rely in taking the check. The inquiry was not whether the body of the check was certified and was then in the same condition in which it was at the time of the certification. Nor was the inquiry whether the check was good for the amount thereof, or whether the amount thereof would be paid. The attention of the teller was called to nothing but the certification. It was presented to him while he was very actively engaged in the ordinary business of the bank paying and certifying checks. There was nothing calling his attention to the number of the check or the amount thereof, and there was nothing requiring that he should stop his business at that time and look at the records of the bank to see whether the check was then in the same condition it was in at the time of its certification. The simple inquiry was whether the certification was good, and it went no further. Suppose the check had never been certified and the inquiry had then been whether the check was good, and the teller had replied that it was, such an answer would in law only have implied that the name of the drawer was genuine and that there were funds in the bank to meet the check, and the bank would not have been responsible for any alteration or forgery of the body of the check, and upon this point there is quite direct authority. In *Marine Bank v. National City Bank*, *supra*, which was an action to recover back money paid upon a check which was certified after it had been raised, it was held that the certificate in such a case means simply that the drawer's signature is genuine; that he has funds in the bank sufficient to meet it, and that the bank engages that those funds will not be withdrawn from the bank by the drawer, and Allen, J., writing the opinion, said: "Hence, in all reason, as well as legally, the inquiring of a drawee in respect to a check and the response, whether verbally or in writing, that it is good, must be held, in the absence of circumstances indicating a wider reach of inquiry and a broader answer, to relate to those facts and those only of which the drawee is presumed to have knowledge, viz., the two facts before mentioned." In *Espy v. Bank of Cincinnati*, which was a similar action, the facts were that a check was drawn by S & M on the bank for \$2,650, in favor of H, and was raised to \$3,920, and the payee's name changed from H to E H & Co., and was offered to

the latter, by a stranger, in payment for bonds and purchased by him. E H & Co. sent the check for information to the bank, whose teller replied, "It is good," or "it is all right," and it was held, among other things, "that when a party to whom such a check is offered sends it to the bank on which it is drawn for information, the law presumes that the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for what may be replied on these points, and, unless there is something in the terms in which information is asked that points the attention of the bank officer beyond these two matters, his response that the check is good will be limited to them, and will not extend to the genuineness of the filling in of the check as to payee or amount." Here the inquiry pointed to nothing but the certification. The attention of the teller was called to nothing else, and the response, when he said that it was good had reference only to the certification, and imposed no broader or greater liability upon the bank than if the check had then first been presented for certification. In *Security Bank v. National Bank*, 67 N. Y. 458, which was an action to recover the amount paid upon a raised check, it was held that the plaintiff was not estopped from alleging the forgery by the fact that its teller, at the time the check was presented for certification, upon doubts being expressed in regard to it by the person presenting it, stated that it was all right in every particular; and that it was no part of the teller's duty to give an assurance as to the genuineness of the check, except in respect to the signature of the drawer, and that beyond that the bank was not bound by his representations. Andrews, J., writing the opinion, said: "If the reply made to the question put to him was intended as an affirmation of the genuineness of the body of the check, it was simply an expression of his opinion, and must have been so understood by the person who made the inquiry." The inference here is as strong as in any of the cases cited that the inquiry related only to the genuineness of the certification, because the inquirer had no knowledge whatever of any of the facts that had previously transpired in reference to the check, or that any facts were in the possession of the bank not ordinarily possessed in reference to checks certified by it. It was the ordinary inquiry whether a check was good or whether the certification was good, and the reply was the ordinary reply that it was good, and imposed upon the bank the liability which such a reply, under ordinary circumstances, imposes. The bank was not called upon for any of the facts in its possession in reference to this draft. But if the inquiry had been broader the bank might have been bound in good faith to have disclosed the facts, and might have been chargeable with bad faith or negligence in not disclosing them, and thus made liable upon this check. But here there was no question of bad faith or negligence submitted to the jury, and they were charged that if the check was presented to the

paying teller with the inquiry alleged, and he replied that it was good, the bank thereby became absolutely bound to pay the same to the plaintiffs.

If the check had been presented for payment, then undoubtedly a different question would have been presented to the paying teller for his consideration. It would then have been his duty to take notice of the facts in the possession of the bank, and payment under such circumstances would have been such a careless act that it would have been held that the bank could not recover back the money.

When the paying teller said that the certification was good, that declaration did not import that there was the amount of money named in the check in the bank absolutely applicable to the payment of the check in any other sense than if the certification had been made after the check had been raised. The certification of a check never imports that there is money in the bank absolutely applicable to the payment of the amount named in the check. On that point it simply imports that the drawer has money to the amount of the check which will not be withdrawn, and which will be paid upon the check if it is properly payable thereon; that is, by the certification, of the drawee bank becomes responsible to pay the holder whatever is properly due upon the check, and nothing more. The same principle would have to be applied if the defendant had been an individual acceptor of a draft. Then the inquiry would have been whether the acceptance was genuine or good, and the answer that it was good would not have imported that the draft was good for the amount for which it then appeared to have been drawn. If the acceptor in such a case actually knows that the draft has been raised and is thus not good for its face, he would be bound, acting in good faith, to disclose that fact. But if at the time he did not know it and was not aware of any defect in or defense to the draft, his reply that his acceptance was good would not of itself estop him, when called upon for payment, from asserting that the draft had been raised or otherwise altered after its acceptance. He might be engaged in accepting so many drafts, or be so situated or engaged at the time that such an inquiry calling attention to nothing but his signature would not bring to his notice the fact that the draft was not then in the same condition as when his acceptance was written. When such an inquiry is made by an acceptor all that can be required of him is that he shall answer in good faith. If the holder desires more accurate information, his inquiry should be more specific and far-reaching before he can transfer a loss caused to him by the fraud of the person with whom he deals to the innocent acceptor.

Here the teller of the bank made no mistake; he answered truly the question put to him. He did not mislead the plaintiffs. They relied upon the certification, which was genuine, and under such circumstances there can be no reason for giving them a remedy against the defendant.

They dealt with the forger and suffered wrong from him, and there can be no rules of law or justice which should, upon any facts now appearing, visit the consequences of this wrong upon the defendant.

Our conclusion is, therefore, that the judgment should be reversed and a new trial granted, costs to abide event.

ANDREWS, C. J., RAPALLO and MILLER, JJ., concur; DANFORTH, J., for affirmance, TRACY, J., concurs.

WEEKLY DIGEST OF RECENT CASES.

MICHIGAN,	19
NEW JERSEY,	3, 6, 7, 18, 29, 30
FEDERAL CIRCUIT COURT,	2
FEDERAL SUPREME COURT, 1, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31	

1. APPELLATE PRACTICE—JURISDICTION OF LOWER COURT CEASES UPON THE ACCEPTANCE OF BOND.

After the acceptance of the bond required by the judge of the lower court in awarding a surseas, the jurisdiction of the lower court ceased and of this court vested, and the lower court had no jurisdiction to make an order requiring additional security, and in default thereof vacating the former allowance of an appeal. *Keyser v. Farr*, U. S. S. C., March 27, 1882. 4 Morr. Trans. 358.

2. ATTORNEY AND CLIENT—LIEN ON SUBJECT-MATTER.

An attorney has no lien for fee unless conferred by statute, and a party to a suit has an undoubted right to settle his suit without the consent of his attorney. *Swanston v. Morning Star Min. Co.*, U. S. C. C., D. Colorado, June 19, 1882. 2 Col. L. Rep. 563.

3. ATTORNEY AND CLIENT—SPECIAL CONTRACT OF SOLICITOR FOR COMPENSATION—ALLOWANCE OUT OF FUND BY COURT.

When there is an express agreement between solicitor and client, whereby solicitor undertakes to do certain services respecting client's interest in an estate for a certain sum stipulated to be paid by client, and in the performance of the duty so undertaken the solicitor takes proceedings in client's behalf in the court of chancery, which results in settling the estate and severing and securing client's share, and entitles him, under the agreement, to the specified compensation; in an action therefor the client ought to be credited with a sum allowed by the chancellor to the solicitor in the proceedings in chancery out of the general funds of the estate, when it appears that the services rendered by the solicitor in those proceedings were such as were included in his contract with his client. *Shreve v. Freeman*, S. C. N. J., February Term, 1882, 44 N. J. L. 78, Reporter's Advance sheets.

4. BANKS—TRANSFER OF STOCK—LIEN OF BANK—WAIVER.

A state statute regulating banks provides that their stock shall be transferable on the books of the corporation only, as regulated by by-laws, but that stockholders indebted to the bank should not transfer their stock without paying or securing

the debt. A firm transferred to a party, as collateral security for a loan, certain shares of a State bank, who sent the certificate to the cashier, and requested a new certificate, and received in reply a letter agreeing to transfer the stock in a short time, it being the custom of the cashier to attend to the stock transfers without consulting with the directors, and the cashier credited him with the stock on the bank books. The cashier was a member of the firm assigning the stock. The firm failed, heavily indebted to the bank, which then refused to transfer the stock. On suit in equity to compel it: *Held*. 1. That the bank, by the act of its cashier, which was binding on it under the circumstances, had waived its lien on the stock, though originally entitled to it. 2. That the title of the stock passed independent of the certificate, which is mere evidence of title, when the bank credited the holder with it on its books, and that the bank thereby irrevocably consented to trust him just as if he were the original subscriber to its stock. 3. That by delaying the assertion of its claim till the party holding the stock had lost all chances of obtaining other security, and by leading him to suppose himself secure by its course of dealing with him, it was estopped from asserting any lien that it had. *Cecil National Bank v. Watsontown Bank*, U. S. S. C., April 18, 1882, 4 Morr. Trans. 400.

5. BOND—NEGOTIABILITY—SUBSEQUENT INDORSEMENT TO "BEARER."

A bond of a South Carolina corporation made originally payable to "W. J. Gayer, receiver," but with a subsequent indorsement by the obligor agreeing, in consideration of forbearance, to pay to bearer, becomes by such indorsement a negotiable instrument, although under seal, and its holder may sue on it in the Federal courts, although the original obligor could not. *Marine and River Phosphate Min. and Mfg. Co. v. Badley*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 384.

6. CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

1. An act which regulates the salaries of certain city officers, which is, and never can be, applicable to but a single city, is unconstitutional. 2. Such act is void, as it is a special and local act. 3. It is also void when in its title it declares its purpose is "to fix and regulate the salaries of city officers in cities of this State," such purpose being misdescribed, as its purpose is to regulate the salaries of officers in a single city. *Coutieri v. New Brunswick*, S. C. N. J., February Term, 1882, 44 N. J. L. 58, Reporter's Advance Sheets.

7. CONTRACT—COMPROMISE OF DEBT—FRAUD AND IMPOSITION.

A compromise voluntarily made without any fraud or imposition will not be set aside, however disadvantageous it may be. But if a debtor fraudulently conceals his property, and by a false and fraudulent representation of his inability to pay, induces his creditor to compound his debt, the creditor will not be bound by the composition. *Ackerman v. Ackerman*, S. C. N. J., February Term, 1882, 44 N. J. L. 173, Reporter's Advance sheets.

8. CONTRACT TO FURNISH BUILDING STONES—CONSTRUCTION.

A contract with a company furnishing building stones in which the party receiving them agreed to pay "the sum of sixty-five cents per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet in each stone, and

one cent additional for every cubic foot of those having such dimensions exceeding twenty feet," construed to mean that the additional compensation was to be estimated on every cubic foot contained in blocks exceed twenty feet in dimensions, and not merely on every cubic foot in excess of twenty feet in such blocks. *United States v. Dix Island Granite Co.*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 312.

9. ESCROW—LICENSE UNDER PATENT—BURDEN OF PROOF.

Where a license is in the possession of the party claiming under it, and is absolute and unconditional on its face, the burden of proof is on the licensor when he asserts that it was delivered as an escrow. *Mellon v. Delaware, etc. R. Co.*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 382.

10. FEDERAL COURTS — APPEAL FROM SUPREME COURT OF WYOMING TERRITORY — PECUNIARY LIMIT.

Under secs. 702 and 1909 of the Revised Statutes of the United States, the amount required to appeal from the Supreme Court of Wyoming to this court is \$1,000, and that also in cases where the United States are appellants. *United States v. Union Pacific R. Co.*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 303.

11. FEDERAL COURTS—APPELLATE PRACTICE.

Under the act of February 16, 1875, a bill of exceptions is only necessary to ingraft upon the record such ruling of the court, excepted to at the time, as otherwise would not be a part of it; but the findings of the court and errors arising on them are reviewable without any bill of exceptions. *Nickerson v. Merchants Steamship Co.*, U. S. S. C., March 27, 1882, 4 Morr. Trans., 360.

12. FEDERAL COURTS — APPELLATE PRACTICE — FEDERAL SUPREME COURT.

In cases of trials not by jury in the court below, a statement is necessary to enable the Supreme Court to review the decision of the lower court. *Bonifield v. Price*, U. S. S. C., March 27, 1882, 4 Morr. Trans., 357.

13. FEDERAL COURTS — APPELLATE PROCEEDINGS FROM TERRITORIAL COURTS.

The act of Congress of April 7, 1874, in relation to appellate proceedings from territorial courts, held to require all cases in which there is not a trial by jury to be brought to this court by appeal, and not by writ of error; and held to apply to all territorial courts, and not merely to those where the distinction between suits at law and in equity had been abolished. *Hecht v. Boughton*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 301.

14. FEDERAL COURTS — ENFORCING STATE LAW — WILL FOLLOW STATE PRECEDENTS.

It is the duty of the Federal courts in all cases within their jurisdiction depending on local law to administer that law, so far as it affects contract obligations and rights, as it was judicially expounded at the time such obligations were incurred or such rights accrued; and they do not feel bound to follow later decisions of the State courts modifying the rule previously expounded by them, in respect to contracts made on the faith of the law as first expounded. *Taylor v. Ypsilanti*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 336.

15. FEDERAL COURTS — STATE DECISIONS FOLLOWED.

A decision of the court of last resort in a State as to when a certain section of the State Constitution, relating to municipal subscriptions to railroad or

private corporations, took effect, which had been assumed as correct in several decisions of this court, followed by this court. *Wade v. Town of Walnut*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 398.

16. FEDERAL JURISDICTION — CITIZENSHIP — PRESUMPTION.

The citizenship which would oust the jurisdiction of the Federal courts must be made to appear of record, and it will not be presumed that a party who might defeat the jurisdiction was a citizen at the institution of the suit, merely because he was such at the time of the transaction out of which the suit arose. *Marine and River Phosphate Co. v. Bradley*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 384.

17. INJUNCTION—SECURITY FOR DAMAGES—ASSESSMENT—COURT OF EQUITY.

1. A court of equity has, as an inherent power independent of statute, the right to impose terms or require security for damages from the party applying for an injunction; and this power is inherent in the Federal Circuit Courts, as courts of chancery, independent of statute. 2. And having the power of imposing terms, it has also the power to mitigate them or relieve from them. 3. It seems that the chancery court which awarded the injunction has the inherent power, on deciding against the complainant, to proceed in the same suit to assess the damages arising from the injunction, and will not leave the parties to an action at law on the injunction bond. 4. The decision of the inferior court on the amount of damages sustained by an injunction suit is so much a matter of discretion that it will require a very clear case for this court to reverse it. *Russell v. Farley*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 410.

18. INSURANCE, FIRE—RESTRICTION AGAINST OTHER INSURANCE.

A condition annexed to and made part of a policy of fire insurance, which provides that "all and every person insuring in this company must give notice . . . of any other insurance effected in their behalf on said property, . . . in which case each office shall be liable to the payment only of a ratable proportion of any loss or damage which may be sustained," etc., is not restricted to other insurance effected prior to the execution and delivery of the policy in question. It is applicable to all other insurances, whether effected before or after the policy in question. *Warwick v. Monmouth County Mut. Fire Ins. Co.*, S. C. N. J., 44 N. J. L. 83, Reporter's Advance Sheets.

19. INSURANCE, FIRE—POLICY SUBJECT TO BY-LAWS OF COMPANY—NEW CAUSE OF FORFEITURE.

A fire insurance company can not, by a by-law adopted after a policy is issued, introduce a new cause of forfeiture into the policy, although the policy is declared to be subject to the charter and by-laws of the company and to the laws of the State. *Becker v. Farmers' Mut. Ins. Co.*, S. C. Mich., June, 1882, 14 Reporter, 177.

20. INSURANCE, LIFE—TEMPERATE HABITS—EVIDENCE.

1. An instruction that "where, in a question whether the insured is of temperate habits at the time when he seeks to be insured, witnesses testify from their own knowledge of the party and his habits that he was not temperate, their testimony is entitled to greater weight than those who testify otherwise, because the latter have not seen or

known of such habits as are testified to by the former," is improper, (a) because it assumes that there was a difference in the source of knowledge of the witnesses, which is a fact not proved; (b) because in a question of such character it depends on their respective opportunities for judging whether the knowledge of the is more to be trusted than the opinion of the other; (c) because it omits the consideration of the character of the witnesses. 2. A representation that a party is of temperate habits is not untrue if his habits in the usual every day routine of his life are temperate, even though it is proved that he had had an attack of delirium tremens, for that may have resulted from a single debauch. *Knickerbocker Life Ins. Co. v. Foley*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 426.

21. MUNICIPAL BONDS—DONATION TO PUBLIC IMPROVEMENTS—INNOCENT PURCHASER.

1. A purchaser from a *bona fide* holder of negotiable paper succeeds to his rights. 2. There is no substantial distinction between a donation by a municipal corporation to a public improvement to aid its construction and a subscription to its stock for the same purpose. 3. Bonds voted to one company are not invalidated by being delivered to a consolidated company into which the first company had been merged, and which under a State statute succeeded to all the rights and privileges of the first company. *Township of New Buffalo v. Cambria Iron Co.*, U. S. S. C., March 27, 1882, 4 Morr. Trans., 353.

22. MUNICIPAL BONDS—POWER TO PLEDGE CREDIT OF MUNICIPALITY—CONSTITUTIONAL LAW.

1. Under a statute which authorizes a municipality to pledge its aid to a railroad "by loan or donation, with or without conditions," a resolution of a city voting aid on condition that if any of its citizens should subscribe and pay for any stock of the railroad, the latter should deliver to such persons the bonds of the city to that amount, * * * and that its citizens should have the right to subscribe to its stock for a certain time, is a loan or donation within the meaning of the statute. 2. The legislature of a State, in the absence of constitutional prohibition, can authorize municipalities to aid in the construction of railroads owned and managed by private persons. 3. The act of the legislature of Michigan of March 24, 1869, authorizing certain municipalities to aid in the construction of a railroad, is not in conflict with sections 6, 8 and 9 of article 14 of the Michigan Constitution forbidding the credit of the State from being granted to private persons or corporations, and forbidding the State from subscribing to the stock of any corporation or from being interested in any work of internal improvement, and forbidding any person from being deprived of property without due process of law. *Taylor v. Ypsilanti*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 326.

23. MUNICIPAL BONDS—PRECINCT BONDS UNDER THE NEBRASKA STATUTE.

1. In Nebraska, bonds issued by authority of a vote of a precinct for public purposes must be in the name of the county of which that precinct forms a part—a precinct being a mere subdivision of a county, and not a separate political entity—and suit on such bonds must be against the county, the judgment to be paid by a tax levied only on the taxable property of the precinct. 2. Although the State statute authorizing the issue of such bonds provides the special remedy of a *mandamus* for their enforcement, yet, inasmuch as a suit to

get judgment on bonds or coupons is part of the necessary machinery of the Federal courts in enforcing the writ of *mandamus*—which is, in such courts, in the nature of an execution, and will not be issued till judgment is obtained—a suit to obtain such judgment is maintainable. *Davenport v. County of Doage*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 305.

24. PATENT—REISSUE—VOID, AS TOO BROAD.

1. An original patent claimed for a combination between a hydrant and a casing or jacket around it, but not attached to it, and resting on a flange projecting from the induction pipe, the purpose being to prevent the action of frost on the hydrant; and the reissue claimed these elements separately and not as a combination: *Held*, that the reissued patent was void, as enlarging the scope of the original, and also as being for a substantially different invention. 2. The patent to Race and Matthews, dated November 16, 1869, claiming for an improvement in hydrants, which merely covered a jacket slipping over it like a sleeve and having room to play to protect it from cold: *Held*, void, as being too general, and covering things in use before the date of the patent. 3. The defendant held, on the facts, not to have infringed the valve apparatus covered by the same patent. *Matthews v. Boston Machine Co.*, U. S. S. C., March 27, 1882, 4 Morr. Trans., 347.

25. PATENT—VOID, AS TOO BROAD—LACHES IN APPLYING FOR REISSUE.

1. The patent granted June 22, 1858, to Gideon Bantz, construed to be for a combination of several devices, and his reissue granted February 6, 1872, construed to claim each device separately, and hence to be void as being too broad. 2. But, even if valid, the laches of waiting for nearly fourteen years before applying for a reissue is fatal to it. *Bantz v. Frantz*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 341.

26. RAILROAD—EXEMPTION OF PROPERTY FROM TAXATION—CONSTRUCTION.

1. Under a charter of a railroad exempting its capital stock and dividends to a certain amount from taxation, lands granted to the company by the State to aid in the construction of the railroad are not exempt. 2. An Arkansas statute providing that certain swamp lands should be exempt from taxation for ten years or until reclaimed, construed to mean that they are exempt for ten years if not sooner reclaimed, but that the exemption ceases on reclamation. *Memphis, etc. R. Co. v. Loftin*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 361.

27. RIPARIAN RIGHTS—COLLECTION OF WHARFAGE—MUNICIPAL CORPORATION.

1. The right of the City of New Orleans under Louisiana law is simply that of building levees and wharves on the river banks within its corporate limits for the public utility, with the exceptions established by paramount law, and of collecting reasonable wharfage for their actual use; but it has not the exclusive right to collect wharfage within such limits, and it is no violation of its rights for a corporation holding by a good title a part of the river bank to collect wharfage for its use. 2. Even if such latter corporation has not, under its charter, the right to collect wharfage, and its acts in so doing are *ultra vires*, yet one who is not a stockholder, and whose legal rights are not invaded by its so doing, has no such interest as entitles him to set up such alleged violation of its charter as a ground of enjoining the corpo-

ration from collecting wharfage. *New Orleans, etc. R. Co. v. Ellerman*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 201.

28. STOCKHOLDER'S LIABILITY—COURT OF EQUITY—JURISDICTION.

Where a statute makes the stockholders of a corporation jointly and severally liable for its debts under certain circumstances, a court of equity having acquired jurisdiction to enforce the lien of a debt due by the corporation, may, in the same proceeding, to avoid multiplicity of suits, enforce the individual liability of the stockholders. *Marine River Phosphate Co. v. Bradley*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 384.

29. SURETY—ON COVENANT OF MARRIED WOMAN.

Even though the covenant of a married woman be held void for coverture, the covenant of her surety is enforceable. *Wagoner v. Watts*, S. C. N. J., February Term, 1882, 44 N. J. L. 126, Reporter's Advance Sheets.

30. TRUST—LOAN OF TRUST FUNDS WITHOUT AUTHORITY—DEFENSE.

If a receiver loan trust funds without legal authority, and take a promissory note for security, the want of such legal authority is not a good defense in an action on the note, brought by a subsequently appointed receiver, who holds it as part of the assets of the trust estate. *Corbin v. De La Vergne*, S. C. N. J., February Term, 1882, 44 N. J. L. 70, Reporter's Advance Sheets.

31. UNITED STATES TREASURY—TRANSCRIPT FROM, AS EVIDENCE.

1. A treasury transcript containing an account of the United States with a tax collector under the internal revenue act, in which are included collections of assessments made under a former term of office, is *prima facie* evidence of the fact of indebtedness which it certifies, in a suit on his bond for a succeeding term; there being nothing to show that during his succeeding term he had not collected assessments so made during the preceding term. 2. But even if collected during the preceding term, this was not sufficient to exclude entirely such a transcript containing charges admittedly collected during the succeeding term. 3. Receipts of the collector are admissible in evidence against him, and being part of his official transactions, are original, even though they are summaries or abstracts of alphabetical lists containing in detail the persons and amounts assessed. *United States v. Hunt*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 376.

CORRESPONDENCE.

THE CONSTITUTIONAL AMENDMENT.

To the Editor of the Central Law Journal:

The business of lawyers teaches them to wrangle; their first impulse is to attack. That fault may be found with the proposed amendment, that defects may exist in it, is no reason why it should be rejected. The question is: Will the amendment be a real benefit to the people of this State; will it be a remedy for the evil which calls for it? It will not do to say, when the court shall be so changed, it will not be perfect. So long as judges are men courts will be imperfect.

We are of opinion that whatever is best for the lawyer is best for the client. Good laws and the speedy ending of litigation when begun are equally beneficial to each. In considering this subject, I assume that we are looking out for the present. As lawyers we may have a vague idea that somehow we are to practice law here forever, but we know that our business life is short; for us, what is done must be done quickly.

The cause of the proposed amendment is the alarming delay in litigation. So far as the most of this State is concerned, at least, it takes about a year after a suit is begun, before it is tried; when appealed, about three and one-half years pass before it is reached. The chances are in favor of a reversal. (In the 73 Mo., seventy cases were reversed and sixty-three affirmed.) Another year goes by before it is retried again; it may go up with like delay. Nine years are gone! In the meantime litigants, if men, very often die; or, if they live, become insolvent; if they are corporations, they have been sold out under some mortgage, and have ceased to exist. Not only is the delay bad for litigants, but for many not actually engaged in the litigation. Titles, as well as other matters, remain unsettled. Statutes are passed from time to time of general interest, yet so drawn that no one can interpret them but the Supreme Court. Vast numbers wade around in the dark for years waiting for light to come. This delay causes extra work to the lawyer; by the time the case is reached in the appellate court the record has become erased from his memory, and he has again to gorge himself with a mass of facts which are far from nourishing.

This condition of things does not sit so hard upon the old lawyer as upon the young. The former have cast so much of their bread upon the waters, that it, though somewhat mouldy, is floating towards them after many days with some degree of regularity. It does not appease the hunger of the younger to be told that he will be thus fixed some day.

Say what we may, the law abounds in technicalities. For example, parties may come to trial, introduce all their evidence, have the jury properly instructed, no objection being made to anything, yet the judgment may be set aside, because of an objection made for the first time in the Supreme Court. 71 Mo. 514. The delay in this State is alarming. It is destroying litigation. It may be said, if such is the result, it is good. Not so. It will not do to get a people to believe they can not assert their rights; that they must tamely submit to a wrong, because, for instance, they may be poor and unable to stand the lengthy warfare which is only possible to the wealthy. This will surely beget a disregard for the law, and a disrespect for the government under which they live. Very many compromise and take half a loaf when they should have a whole one; and many more would do the same thing, if they only knew what litigation afterwards teaches them.

The amendment proposes relief. It is true, that

only three judges pass upon a case. The Supreme Court of this State, until a few years, had but three judges. A change was made, not because the opinions of such a court were unsatisfactory, but on account of the increase of business. Safety does not rest in the number, but in the ability, industry and integrity of the judges. True, it is parties defeated who will not be pleased with the opinion of these judges. Would they be pleased with the decision of a court composed of one hundred?

Again, it is said the Chief Justice, under the amendment, would be a monarch. This is not fair argument. Why are not judges of courts held by one judge, monarchs? We can not fairly assume that a man would be such a fool; and if he should be, his crown would be one of thorns. It does seem that we ought to vote for the amendment. It will be a remedy for the evil which it was designed to correct. Under it, each member of the court will be a free man, and not a sub, as the man must be who sits as a judge under some of the proposed plans. No man who is fit to be a judge, can be placed in a different position.

We have been led to say what we have, because of an elaborate paper sent us, coming from members of the St. Louis bar, urging the defeat of the amendment. Possibly, the reason of the effort comes from the proposed change in their court of appeals.

C. O. TICHENOR.

Kansas City, Mo.

RECENT LEGAL LITERATURE.

LIFE OF JOHN, LORD CAMPBELL. Lord High Chancellor of Great Britain. Edited by his daughter, the Hon. Mrs. Harcastle. American edition. Two Volumes. Jersey City, N. J.: Frederick D. Linn & Co. 1881.

Dr. Holmes tells us in the "Autocrat of the Breakfast Table," that in every human being there are three distinct entities: The man as he appears to others, the man as he conceives himself to be, and the man as he really is—known only to his maker. The witty author has omitted a fourth presentation of human nature which is to be found only in an autobiography—the man as he desires to be considered by other people. The biographer is usually a partisan, and his portrait is most complaisantly flattered; when the delineation is by the party most interested, this amiable weakness is especially conspicuous.

The handsome volumes before us profess to be the life of Lord Campbell, edited by his daughter, and are composed of selections from his autobiography, his diary and his letters. Under such auspices there could be, of course, no glimpse of anything unpleasant or likely to militate against the high character of the great jurist, or present him in any other than an imposing light. We have made due allowance for the influences of filial piety in making the selections and presenting

the most favorable phases of Lord Campbell's life and character. Reading the book carefully in this cautious mood, we have been unable to find "between the lines" anything sustaining the charges which have been freely made against him, as usually against successful men, of undue devotion to self and subordination of public duty to private interest. Lord Campbell was a true Scot, "aye ganging and aye getting," but although he attained the highest pinnacles of his profession, he owed very little of his uniform success to political influence, or anything less legitimate than hard work. This was the solid substratum of his character throughout his long career. According to one definition of a much defined word, he was a man of genius, for he had an unlimited capacity of "tolling terribly."

Lord Campbell was the son of a Scotch clergyman who had little money and no specially influential connections; he was of ancient lineage, of course, he were otherwise neither Scot nor Campbell. In early life, after the manner of his enterprising countrymen, he went to England to seek his fortune, and for more than the first half of the nineteenth century, he was identified with the legal profession in its great stronghold—London; and there, by dint of indomitable energy and perseverance he raised himself to its highest positions. He was honorably connected with the legal and political reforms that were effected during the period of his active life, and his memoirs embodied in these volumes present many highly interesting sketches of the historic personages who flourished in England during the first and second quarters of the present century.

Whoever is interested in the history of the legal profession during its most brilliant and progressive period, and of the eminent men who then adorned the bar and bench of England, will find these volumes in the highest degree instructive and entertaining, and we commend the work most cordially to the profession and the general public.

SHELDON ON SUBROGATION. The Law of Subrogation. By Henry N. Sheldon. Boston, 1882: Soule and Bugbee.

As the body of our system of law grows, both in extent and in the perfection of developed detail, the books which treat of what has been heretofore regarded as a subdivision of a subject, increase in number and usefulness. With the development of the law, there have grown up many doctrines which can not be reached in the discussion of general principles, and for this reason are generally the subjects of doubt and uncertainty in the legal minds. Such is the law of subrogation, and unless we are much mistaken, the work before us will be warmly welcomed by the profession.

The author's arrangement of his matter is, in our opinion, eminently practical and fortunate. Instead of the logical division into two general heads, under one of which is treated the subroga-

tion of parties holding subordinate interests in property, to the rights and remedies of persons holding permanent interests, after they have, for their protection, satisfied these; and under the other, the subrogation of one of several debtors, who has satisfied a common creditor, he has adopted the more practically useful plan of a general chapter on subrogation of parties having successive claims, followed by chapters considering separately subrogation in cases of suretyship, among joint debtors, among parties to bills and notes, in the administration of estates, under contracts of insurance, and in favor of strangers. In his preface the author says that, although the subject is a small one, he has "endeavored to make a copious citation of authorities, even at the risk of seeming needlessly to multiply references for the support sometimes of undisputed propositions;" and his citations are unquestionably abundant, being in the neighborhood of 2,500 cases, which, for a volume of 290 pages of text, is a liberal number. But we think that so far from there being any danger of error in citing too many cases in support of well established principles, the danger is just the other way. We consider that no book can be regarded as exhaustive of any given subject, which does not actually cite all the cases in point. It must be remembered, too, that in this country, the great majority of the readers of law books have not access to complete libraries, and if the author cites only so many cases upon a given point as may seem to him necessary to establish the doctrine, and the reader desires to look up the cited cases for the purpose of verifying or illustrating the text, it may happen that the very cases which the author omitted are those of the reader's own State, or to which he had access. There is unquestionably a growing demand on the part of the profession, that a text-book shall exhaust a topic by citing all the reported cases which are in point.

The typography, paper and presswork are all first class, and the volume presents a handsome appearance.

QUERIES AND ANSWERS.

**The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

22. M is a girl ten years of age, adopted in the family of P, in whose house (being the only female, except the wife) she is treated as a menial servant, having to do most of the household work, such as washing, ironing, milking, etc., for which her strength and years are inadequate. To this treatment her relatives remonstrate, and ask that she be taken from P and

they have custody of her. What action should be pursued? Sec. 2, div. 1, of our Criminal Code, Rev. Stat. 1874, provides that: "Whoever takes or detains a child under twelve years from parents, guardians, or other person having lawful charge of such child shall be fined and imprisoned; *Provided*, that this section shall not apply to any one who in good faith interferes to protect the child from abuse or cruel treatment." Would this section permit abduction? W. H. B. Bloomington, Ill.

23. T H M procures insurance on his life, and causes policy to be made payable "to his wife, A A M, and his children." At the time the policy is issued he has two children. Subsequently he has another child. He dies, leaving his wife and three children surviving him. Has his last child any interest in the policy? What interest has his wife, A A M in it? Does she take one-half, or an interest equal to each of such of the children as take an interest? Or does she take a life estate, and the children an interest in remainder. Maysville, Ky. C. & S.

24. Are there any provisions in the statute of Massachusetts which change the common law rule, that the volume of a water-course must not be substantially or materially diminished? And as to municipal corporations taking water of a water-course to supply its citizens with water, is there any change, except giving remedy in an action for future or prospective damages? W. S. R. Mansfield, O.

25. forcible entry and detainer in Missouri: Defendant had improved the premises by building a house, etc., before the suit, the lot being vacant at the time of the entry. 1st. Can the plaintiff recover rents and profits of the premises as improved, from the time of entry until suit brought, or will he be restricted to ground rent? 2d. Should the verdict state the monthly value of the rents and profits, at the time of trial, to be of the premises as improved, or only that of the ground? J. F. P. St. Joseph, Mo.

QUERIES ANSWERED.

Query 18. [15 Cent. L. J. 139.] A promissory note is given which includes the phrase "with attorney fees." On the day after maturity, the note was presented to the maker by an attorney, with attorney fees taxed upon the same. Can such fees be collected off the maker? In other words, when, in such note, are attorney fees mature?

Danville, Ind.

M. W. H.

Answer No. 1. An agreement in a note, like the one above, to pay attorney fees, is reasonable, and will be enforced. But the liability can only result from the debtor's own default. Hence, attorney fees mature when the debtor fails to make payment at maturity, and an attorney has performed professional services in the collection of the same. W. C. S.

Delphi, Ind.

Answer No. 2. The maker of a note may agree to pay expenses of collection, or "attorney fees," and such stipulation, if unconditional, is valid. 5 Ind. 380; 77 Ind. 583. If no sum is named the amount may be proven on the trial and probably must be "reasonable." 37 Ind. 512. In ordinary cases it would unquestionably be harsh dealing to charge attorney's fees upon a note if paid the day after maturity; but if there appears to be reason for placing it in an attorney's hands for collection, any reasonable fee

charged by him for the collection could certainly be recovered off the maker of the note under the above stipulation. In other words, the "attorney's fees" mature whenever such expenses have reasonably been incurred in the collection of the note; although the fees may not yet have been paid by plaintiff. 34 Ind. 334. W.

Indianapolis, Ind.

Query 19. [15 Cent. L. J. 139.] A, being indebted, executed to B, in 1875, in Missouri, his promissory note for \$50, payable six months after date. At that time A was insolvent, and remained so until recently, when B called upon him for payment and threatened suit, stating, at the same time, that he had long since destroyed the note under the supposition that it would never be worth anything. How can B collect his debt? Can he recover under sec. 2852 Rev. Stats. Mo., providing for the institution of suits on instruments lost or destroyed, or does his voluntary destruction of the note amount to a cancellation thereof? JAMBON.

St. Louis, Mo.

Answer. In Missouri the slightest alteration of a promissory note, however immaterial, avoids it. And this is the rule, although the alteration is made with pure motives and is beneficial to the payor. *Moore v. Hutchinson*, 69 Mo. 429; *Evans v. Foreman*, 60 Mo. 450, 451. In *Haskell v. Champion*, 30 Mo. 186, Scott, J., says: As the nature and purposes of contracts require that they should pass to the hands of those who are interested in altering them to the prejudice of those who execute them; and as the facilities for making alterations are numerous, and the difficulty of proving them great, all means should be employed to impress upon the minds of those who are in possession of such paper, a sense of its inviolability." To the same effect, see cases cited in *Evans v. Foreman*, *supra*. If, then, the law is so jealous of the inviolability of written instruments, what shall we say if the holder purposely destroy it? If he should be permitted to recover, either on the original consideration or upon the lost instrument, would not a wider door be open for fraud, than in the case of an alteration? See sec. 1264 Wharton Ev. It is held in *Whitmer v. Frye*, 10 Mo. 348, that if a holder of a note alter it, he can not recover from the maker. "neither on the instrument nor for money had and received."

Lancaster, Mo.

E. HIGBEE.

NOTES.

—In the action of M. Duverdy, of the French bar, against M. Zola for giving the plaintiff's name to one of the characters in the "Pot-Bouille," M. Rousse, the plaintiff's counsel, said: "M. Duverdy has not the honor of knowing the author of the 'Pot-Bouille.' He has never been counsel against him, which sometimes begets enmity; he has never been counsel for him, which always begets ingratitude. ('Il n'a point plaide contre lui, ce qui fait quelquefois des ennemis; il n'a point plaide pour lui, ce qui fait toujours des ingrats.')

—Scarlett, in a breach of promise case (*Foot v. Green*) was for the defendant, who was supposed to have been cajoled into the engagement by the plaintiff's mother, afterward the Countess

of Harrington. The mother as a witness completely baffled Scarlett, who, on behalf of the defendant, cross-examined her; but by one of his happiest strokes of advocacy he turned his failure into a success. "You saw, gentlemen of the jury, that I was but a child in her hands. What must my client have been?"

—David Josiah Brewer was renominated by acclamation for one of the justices of the Supreme Court of Kansas, at the late Republican State Convention held in Topeka last week. This nomination secures his re-election as judge for a term of six years, as the majority in Kansas for the Republican State ticket ranges from 15,000 to 35,000, and Judge Brewer is one of the most popular of all the candidates. He has had large judicial experience for one of his age. In 1862 he was elected judge of the probate and criminal courts of Leavenworth County; in 1864 he was elected judge of the First Judicial District, and in 1870 was promoted to the Supreme Bench of Kansas; was re-elected to the Supreme Bench in 1876, and has just again been re-nominated to the same place. He is a son of Rev. Josiah and Emilia A. Brewer, and was born June 20, 1837, in Smyrna, Asia Minor, where his father was stationed as a missionary. His mother is a sister of David Dudley Field, Cyrus W. Field and Stephen J. Field. He was graduated by Yale College in 1856, then studied law with David Dudley Field in New York City, and completed his legal studies at the Albany Law School, from which he graduated in the class of 1858. He settled in Leavenworth, Kansas, in the fall of 1859, and has been a resident of that city ever since. If the measure known as ex-Judge Davis' Bill, now pending in Congress, is adopted, it is believed that the bar and press of Kansas will demand the selection of Judge Brewer as one of the circuit judges to be appointed under the provisions of that act.

—One of the most learned and dignified members of the Austin bar got a terrible rebuff from old Uncle Mose last week. The old man had Jim Webster hauled up before Justice Gregg for stealing his Spanish chickens. As Jim Webster had political influence, he was defended by two prominent lawyers. Uncle Mose was put on the stand and made a bad case against Jim Webster, testifying to having found some of them in Jim's possession, and identifying them by the peculiarities of the breed. One prominent lawyer then undertook to make Uncle Mose weaken on the cross-examination. "Now, Uncle Mose," said the lawyer, "suppose I was to tell you that I have at home in my yard, half a dozen chickens of that identical same breed?" "What would I say, boss?" "Yes, what would you say if I was to tell you I've got that same kind of chickens in my yard?" "I would say, boss, dat Jim Webster paid up yer fee wid my chickens;" and a pensive smile crept around under the old man's ears and met at the back of his head.—*Texas Siftings.*